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August 20, 2004

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AUG 20 2004

Marlene H. Dortch, Secretary  
Federal Communications Commission  
c/o Natek, Inc.  
236 Massachusetts Avenue, N.W., Suite 110  
Washington, DC 20002

Federal Communications Commission  
Office of Secretary

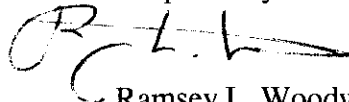
**Re: Ex Parte Notification  
CC Docket No. 02-6  
CC Docket No. 96-45  
CC Docket No. 97-21  
File No. SLD-245592**

Dear Ms. Dortch:

On behalf of the State of North Dakota, Information Technology Department, this is to advise the Commission that the undersigned met with Richard Lerner, Associate Bureau Chief of the Wireline Competition Bureau and Narda Jones, Chief of the Telecommunications Access Policy Division on August 16, 2004, to review the legal issues raised in the State's pending Petition for Reconsideration of the Commission's Order, FCC 03-240, released October 21, 2003, in the above-referenced matter. A copy of the Summary of Petition for Reconsideration summarizing the issues discussed is attached for the information of the Commission.

Should there be any questions with respect to this presentation, please contact the undersigned.

Respectfully submitted,



Ramsey L. Woodworth

Special Assistant Attorney General  
State of North Dakota

cc: Richard Lerner, Esquire  
Narda Jones, Esquire

Mr. Woodworth 012  
Lisa/2004

IMPOSITION OF THE “NEW AND FIRM”  
YEAR 4 FILING REQUIREMENT  
VIOLATED THE PAPERWORK  
REDUCTION ACT AND IS UNLAWFUL

SUMMARY OF PETITION FOR RECONSIDERATION

File No. SLD-245592

STATE OF NORTH DAKOTA  
INFORMATION TECHNOLOGY DEPARTMENT

# Paperwork Reduction Act Requirements

- Section 3507(h)(3) of the PRA requires OMB approval for any substantive or material change to an existing information collection requirement :
  - “An agency may not make a substantive or material modification to a collection of information after such collection has been approved by the Director, unless the modification has been submitted to the Director for review and approval under this subchapter.”

# Paperwork Reduction Act Requirements

- The PRA applies to all substantive and material changes in burdens associated with the collection of information, including “adjusting the existing ways to comply with any previously applicable instructions” and “transmitting, or otherwise disclosing the information . . .” 44 U.S.C. §3502(2) & (F).
- A collection of information includes “the act of collecting and disclosing information” and any “plan and/or other instrument calling for the collection or disclosure of information . . .” 5 C.F.R. §1320.3(c).

# Paperwork Reduction Act Requirements

- Section 3512(a) of the PRA, Public Protection” requires that no penalty, such as dismissal of an application, may be imposed for a failure to comply with an unauthorized information collection requirement.
- Section 3512(b) provides that “the protection accorded by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto.”

## **The NEW and FIRM Year 4 Filing Procedures**

- “Year 4 features NEW and FIRM filing requirements. The January 18 deadline is a POSTMARKING deadline. . . . Unlike year 3, all materials associated with the Form 471 must be postmarked no later than January 18.” SLD WEBSITE, What’s New (November 2, 2000)
- The “NEW and FIRM” filing requirements were a substantial and confusing change to an information collection requirement within the scope of the PRA. They imposed a more stringent hard and fast “postmark” deadline and changing the definition of completion from receipt by SLD to the “postmark” date.

## **The NEW and FIRM Year 4 Filing Instructions Were Not Approved By OMB.**

- While posted on the SLD Website, the “NEW and FIRM” requirement was not mentioned in the FCC instructions attached to the Year 4 Form 471, which were virtually identical to those for Year 3.
- FCC initially sought and received OMB approval only for an extension of the existing Form 471 and Instructions.
- Nor was OMB approval for the “NEW and FIRM” filing requirement sought or obtained in a subsequent last-minute application to make certain minor non-substantive changes in the year 4 form.

# **The NEW and FIRM Year 4 Filing Instructions Were Not Approved By OMB**

- Furthermore, the electronic Forms failed to “display” any OMB control number, valid or otherwise, as required by Section 3512(b).



## **The NEW and FIRM Year 4 Filing Instructions Were Not Approved By OMB**

- An application must be reinstated *nunc pro tunc* when it has been dismissed for failure to comply with an information collection requirement not approved by OMB.
  - *Portland Cellular Partnership, et al.* 11 FCC Rcd 19997 (1996) *aff'd sub nom Saco River Cellular v. FCC*, 133 F. 3d 25 (D.C. Cir. 1998), *cert denied*, 525 U.S. 813 (1998)
  - *Fair Oaks Cellular Partners*, 10 FCC Rcd 9980 (1995)
  - *Kent S. Foster*, 7 FCC Rcd 7971 (1992)